In the High Court of Judicature at Madras

Dated 07.06.2007

Coram

The Honourable Mr.Justice S.R.SINGHARAVELU

Appeal Suit No.1112 of 2004

B.K.Subramania Sah (died)
2. Rukmani Bai
3. Parimala Devi
4. Rajeshwari Bai
5. Suresh Sah ..Appellants/ Defendant

..vs..

1. B.S.Ramachandran
2. Saraswathi Bai
3. Shankar Sah

(Appellants 2 to 5 and respondents 2 and 3 were brought on record as LRs.of the deceased 1st appellant vide order of Court dated 20.01.2006 in CMP.No.16056 of 2005) ..Respondents/ Plaintiff

Appeal Suit filed under Sec 96 of CPC against the judgment and decree dated 12.03.2004 made in O.S.No.4437 of 2002 on the file of Additional District Judge, Fast Track Court-V, Chennai.

For Appellants : Mr.F.X.A.F.Denny

For Respondents: Mr.A.Venkatesan for R1
Mr.M.Thomas Acquinas for R2

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JUDGMENT

This appeal arises against the judgment and decree of learned Additional District Judge of Fast Track Court-V, Madras, in passing a preliminary decree for partition of 3/4th share in suit property and injunction in favour of respondent/plaintiff; against which, this appeal was preferred by the defendant.

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2. For the sake of convenience, the parties are referred to as they are described in the plaint. Admittedly, the appellant/defendant is the father of respondent/plaintiff. Upto the month of June 1995, they were amicably living and thereafter, misunderstanding between the parties arose in respect of the relationship with the daughters of the defendant, who are the sisters of the plaintiff. There were two elder sisters, one younger sister and two younger brothers for plaintiff. D.V.Mohan Sah is the brother-in-law of the plaintiff. Under Ex.B-1, the plaintiff has produced some accounts in connection with Zari business done with Mohan Shah and that document depicts the income gathered by the plaintiff on every month of 1987.

3. The plaintiff claims 3/4th share in suit property, by contending that he had contributed a sum of Rs.1,20,000/- towards the sale price of Rs.1,60,000/- of the suit property that was purchased under Ex.A-1 dated 26.10.1988 in the name of the plaintiff's father. Plaintiff would further contend that such payment of Rs.1,20,000/- was made by two demand drafts of Rs.10,000/- each dated 26.10.1988 and that balance of Rs.1,00,000/- was paid in cash, which was known to Dhanusu, Thangaiah, friend of defendant (P.W.2) and T.S.N.Prabhakaran, Advocate (P.W.3). The plaintiff and defendant were respectively examined as P.W.1 and D.W.1. There are also correspondence between plaintiff, defendant and Thangaiah, which were produced and marked as documents in this case. They throw much light upon the said transaction.

4. Although defendant has denied the alleged contribution of Rs.1,20,000/- made by the plaintiff, the above mentioned correspondence between the parties of the suit and with one Thangaiah, P.W.2 would throw much light upon it. Thangaiah, in his letter dated 18.07.2002 to defendant, which was marked as Ex.A-5, has mentioned as follows:

> "....the first thing that you had told me when I returned from abroad, is that your son had given you Rs.1,20,000/- for purchase of the house. Besides, in your letter dated 23.05.2002, you have again mentioned it and asked me to arrange for its repayment, which I will if you enter into an amicable settlement with your son..."

5. Even in a letter of defendant to P.W.2, Thangaiah, which is dated 23.05.2002 (Ex.A-8), the defendant has chosen to write the following:

> "...My eldest son Ramachander has been sending his wife for asking for Rs.7 lakhs share. I have never asked for a loan. He gave Rs.1.20 lacs for help. But Ramachander has given accounts to his father in magic manner. In post office, the amount will be doubled. National Saving Certificate i.e.Rs.1.2 lacs will become Rs.2.4 lacs. But my eldest son

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is counting every year interest at the rate of Rs.1.20 lacs for 6 years. He is demanding for 6 years at Rs.7 lacs. He sent letter daily, during March 1995 and consequently during April 1996 .... Please arrange to give me Rs.1.40 lacs so that I can give Rs.1 lac to Ramachandran and Rs.0.40 lacs to Sankar for medical help".

The name Ramachander and the reference eldest son in the above letter do indicate only the plaintiff.

6. Again, in another letter dated 22.08.2002 (Ex.A-11) by defendant to P.W.2, it was mentioned that it would be good on the part of P.W.2 to have repaid Rs.1.20 lakhs to the son of the defendant. Similarly, in another letter dated 25.08.2002 (Ex.A-13) it was mentioned by the defendant as follows:

"If you want to help us, you can give Rs.1.20 lakhs to my son R. Chander in full settlement".

7. In yet another letter dated 08.09.2002 of defendant (Ex.A-15) to P.W.2, it has been stated as follows:

"In this connection, I want to inform you that I am due to BSR Rs.1 lac only and balance amount Rs.0.20 lac towards my share of the chit amount due from CBE chit share".

The above mentioned BSR refers to B.S.Ramachander Sah, the plaintiff.

8. Likewise, P.W.2, in his letter dated 14.09.2002 (Ex.A-16) addressed to defendant, has mentioned as follows:

"I committed Rs.1.20 lakhs you already sent your wife to my lodge to obtain Rs.500/- and cheque for Rs.one lakh...".

In the first notice issued by plaintiff on 17.08.1999 which is marked as Ex.A-6, it has been mentioned as follows:

"My client, who is your son, states that he had paid you Rs.20,000/- by way of two demand drafts for a value of Rs.10,000/- each drawn at TNSC Bank prior to 26.10.1988 and also Rs.1.25 lakhs in cash on 26.10.1988, in all Rs.1,45,000/- as you promised to buy a house for my client for the above said consideration..... My client states that you have bought a house located at No.4, Narayana Street, 8th Lane, Pudupet, Chennai-2, which you are presently occupying, recently but you did not give that house to my client, instead you occupied that house.... You are hereby called upon to provide a house for the consideration made or pay back the amount of Rs.1,45,000/- with interest calculated from 26.10.1988 forthwith...."

9. Coming to the evidence aspect, P.W.1, in the course of his chief examination, deposed as follows:

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"நான் ரூ 1.20 லட்சம் கொடுத்தேன். என் தந்தை 40000 ஆயிரம் கொடுத்தார். இ ரண்டும் சேர்த்து வழக்கு சொத்து கிரயம் செய்யப்பட்டது..... நான் ரூ 1.20 லட்சம் கொடுத்தது என் அப்பாவின் நண்பர் தனுசுக்கு தெரியும். என் அப்பாவின் இ ன்னொரு நண்பர் தங்கையாவுக்கு (P.W.2) தெரியும். மேலும் வழக்கறிஞர் டி.எஸ்.என்.பிரகாகரனுக்கு (D.W.3) தெரியும்".

10. Thangaiah, P.W.2, has deposed as follows:

"சுப்ரமணி சா சொல்லியபடி அவருடைய மகனும் அவரும் சேர்ந்து வழக்கு சொத்தை வாங்கியதாக எனக்கு தெரியும். சுப்ரமணி சா தான் அதைப் பற்றி என்னிடம் சொன்னார். 1.20 லட்சம் அவரது மகன் பணம் கொடுத்ததாக சுப்ரமணி சா என்னிடம் சொன்னார்..."

This P.W.2 was a friend of defendant right from 1958 and therefore, he was in close contact with him. He also said that he has acted in such a manner to settle the issue amicably between the father and son, who are the parties to the suit.

11. Even P.W.3 Prabakaran, Advocate has deposed as follows:-

"நான் சுப்ரமணி சாவிடம் பேசினேன். அவர் பணம் கொடுத்தது வாஸ்தவம் என்று ஒப்புக்கொண்டு சிறிது காலம் அவகாசம் கொடுத்தால் பணத்தைத் திருப்பிக் கொடுப்பதாக சொன்னார். நான் ராமச்சந்திர சாவிடம் அப்பாவுக்கு எதிராக மகன் வழக்கு போடுவதை கொள்கைபடி நான் எதிர்ப்பதாகவும் சிறிது காலம் பொறுத்து இருக்குமாறும் சுப்ரமணிய சா பணமோ பாகமோ கொடுப்பார் என்றும் சொன்னேன்..."

12. In view of the above evidence, it is now futile on the part of the defendant to contend that he had never received any amount from plaintiff. An over all appraisal of all the above oral evidence and the particulars found in the letter correspondence between plaintiff and defendant and Thangaiah would go to show that defendant received a sum of Rs.1,20,000/- from plaintiff. That is why D.w.1 in the course of cross examination has pleaded discharge by deposing as follows:

"வாதியிடம் வழக்கு சொத்து வாங்க பணம் வாங்கி திருப்பி கொடுத்தேனா என்றால் பணம் திருப்பி கொடுத்தேன். வாதி வீடு வாங்கும்போது நான் பணத்தை திருப்பி கொடுத்து விட்டேன். என் வீட்டில் இருந்த நகைகளை எல்லாம் எடுத்துப்போய் விட்டார். ரூ 1.20 லட்சம் வாதிக்கு வீட்டில் இருந்து எடுத்துபோன நகைகள் மூலம் சேர்ந்து விட்டது..."

Thus, the plea of discharge by D.W.1 itself would go to show that he had received Rs.1.20 lakhs from plaintiff. For his mentioning in his letter addressed to P.W.2, in the course of cross examination of defendant, it was said as if P.W.2 was due to give him a loan of Rs.5 lakhs and in order to get the same, he was necessitated to address him to make payment to plaintiff a sum of Rs.1.20 lakhs. This explanation is unacceptable because he could

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have directly addressed to P.W.2 requiring him to repay his loan of Rs.5 lakhs if at all it was true. Therefore, it is concretely found that plaintiff had paid Rs.1.20 lakhs to defendant.

13. In view of this finding, the reliance made by the learned counsel for the defendant upon Gurmukh Ram Madan .vs. Bhagwan Das Madan (AIR 1998 SC 2776) cannot serve any purpose. That was a case, where the plea of plaintiff of having contributed equally towards the cost of suit house was not supported by any oral or documentary evidence. Therefore, it was held therein that contribution of price for suit house should be factually proved and in default plaintiff should fail; but that may not be applicable to the present facts of the case, where proof of payment by the plaintiff to the defendant is available as aforesaid.

14. The next question would be whether the payment of Rs.1.20 lakhs made by the plaintiff was as contribution to the purchase of suit house for a sum of Rs.1.60 lakhs?

True it is that under Ex.A-1 dated 26.10.1988, suit house, which is old No.4, New No.2, Narayana Naicken Street, 8th Lane, Pudupet,Chennai, was found to have been purchased in the name of the defendant as he happened to be the elder member of the family. The sale consideration was mentioned in the document as Rs.1,60,000/-. Now it is to be seen as to whether the payment made by the plaintiff for a sum of Rs.1,20,000/- was only as contribution for purchase of the suit house or merely a transaction between the parties to the suit, independent of the purchase of the suit property. Of course, it is to be proved only by plaintiff as was mentioned by the learned counsel for the defendant by relying upon Vembu Ammal .vs. Pattuammal (1999(III) CTC 717), wherein it was held that plaintiffs had pledged properties that was purchased from out of the joint family income and when there is no evidence to prove that the properties in the name of the defendant were purchased from the joint family nucleus, the decree passed by the trial court is to be set aside. Similarly, as held in Pawan Kumar Gupta .vs. Rochiram Nagdeo (AIR 1999 SC 1823), the party, who wants to prove that the recitals of a document are untrue must bear the burden to prove it. In this case also, the recitals of the sale deed of the suit house was as if entire money was paid by defendant and therefore, it is for the plaintiff to prove that he also contributed certain amount for the said purchase. The same position was laid in S.N.Ghosal .vs. Ena Dutta (AIR 1973 Calcutta 128), wherein it was held that the person in whose name property stands is presumed to be the owner and anybody denying the said ownership must prove that he is also a joint owner. In proving the plaintiff's case, the plaintiff cannot be allowed to abandon the specific plea and seek relief on the facts alleged by the defendant. This was also laid down in Lodd Balamukundas .vs.

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K.Kothandapani (84 L.W.172). Thus, the burden lies on the plaintiff to prove the case.

15. Learned counsel for the defendant pointed out that in the first notice to defendant dated 17.08.1999, it was only stated as if defendant promised to buy a house for plaintiff for the consideration that he paid namely Rs.1.25 lakhs. The plaintiff has mentioned in such of his notice that the defendant is to either repay the amount or give a house situate in new No.2, Narayana Naicken Street, 8th Lane, Pudupet, Chennai, which was purchased by the defendant. The learned counsel for the defendant submitted that assuming that the defendant had promised to get a house for the plaintiff and based upon the promise if the plaintiff had parted away a sum of Rs.1,20,000/-, then it cannot be squarely taken as if plaintiff had contributed for particular purchase of the specific suit property. He would contend that there was no consensus of mind between the parties to make use of this amount of Rs.1,20,000/- in getting the suit property purchased. The fact remains that in the plaintiff's notice dated 17.08.1999, it is alleged that there was a promise made by the defendant to purchase a house for plaintiff and based upon which, the latter has paid a sum of Rs.1,20,000/- to the defendant. It is on 26.10.1988, the defendant had purchased the suit property bearing new door No.2, Narayana Naicken Street, 8th Lane, Chennai. Now, the question arises as to whether the payment made by the plaintiff was as a term loan or as contribution to the price of the suit property.

16. In this connection, learned counsel for the plaintiff relied upon Ramachandra Gowder .vs. Nanjappa 1973(I) MLJ 189, Guruswami Asari .vs. Raju Asari(1973(II) MLJ 203) and Ramaswami Naidu .vs. Shyamala Devi (1978(I) MLJ 505). In 1973(I) MLJ 189, the following observation made at page 165 of Snell's Principles of Equity Twenty-fifth edition was culled out in the following lines:

> "Another common case of an implied or resulting trust is where on a purchase property is conveyed into the name of someone other than the purchaser. The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase money. This is a general proposition supported by all the cases, and there is nothing to contradict it, and it goes on a strict analogy to the rule of common law...
>
> The doctrine applies to pure personality as well as lands. It also applies where two or more persons advance purchase money jointly and the purchase is taken in the

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name of one only, in which case there is a resulting trust in favour of the other or others as to so much of the money as he or they advanced".

17. In the second cited case viz., 1973 (II) MLJ 203, it was observed as follows:

"11. Similarly, if A and B enter into an agreement to contribute the consideration for the purchase of a property and to purchase the same in the name of B for the benefit of both, certainly A and B will be co-owners of the property, notwithstanding the title deed standing in the name of B and, in the case of a dispute between them, A will be entitled to file a suit for partition and recovery of possession of his share of the property as agreed to between them.....

Section 45 of the Transfer of Property Act has a limited operation. All that the section says is that, where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced. Thus it will be seen that section 45 only states that the interest inter se as between the several joint purchasers of an immovable property will, subject to contract between them, be in the proportion in which they were entitled to the consideration for the purchase, and has nothing whatever to do with the method of creating common ownership or the manner in which several persons can become common owners in respect of a single item of property"

18. In the third cited case 1978(I) MLJ 505, it was observed as follows:

"Co-ownership is a relationship which springs and slopes from consensus and contract. Legislation has only imprinted on the concept of co-ownership certain rights which have a supervening effect which are declaratory of the rights inter se as between the co-owners. The legal relationship is always knitted in a framework of jointness and no one therein can predicate with certainty as to what portion of the property held in common is his; and an element of

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inseparability is inhered in the doctrine of co-ownership....

If, therefore, there is evidence that two or more persons purchased the property or an interest in the property, then the rule in section 45 of the Transfer of Property Act would be automatically attracted, unless the parties have contracted otherwise in the matter of their quantum of interest in the joint property. The fact that the property was purchased in the name of one of the co-owners, would not make a serious dent on the above rule of good conscience, provided however it is established by acceptable evidence that such purchase in the name of co-owner was by accident or by consent and that the consideration for such purchase emanates from a common fund....

In a proved case of such a holding of property by an individual in his own name, but for the benefit of others, who are also interested in it, the individual has accepted his position as a constructive trustee of such property and he has to hold the same for and on behalf of the person for whom and for whose benefit he holds it.....

Section 90 of the Trusts Act says "where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing thereof of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property or where any such owner on representing all persons interested in such property, gains any advantage he must hold for the benefit of all persons so interested the advantage so gained, but subject to "....". It therefore follows that the concept of co-ownership has certain peculiar rights and liabilities attached to it and that is why it is accepted law that a co-owner cannot even by the mere possessory title of the property in his claim the same by adverse possession. One can be said to hold a property adversely to the other, provided it is open, continuous and public possession which is to the prejudice of the other co-owner. Since such continuous and open and adverse possession by one co-owner against the other is not possible, having regard to the indivisible and well-knit rights of all co-owners of the totality of the property, one co-owner cannot set up an adverse title to the prejudice of the other co-owner though he may be for all physical purposes incorporeal possession of the concerned property".

19. In the above case, reliance was placed upon Arokia Manikaran and another .vs. Sowarivaru Manikaran and others ((1952)8 DLR.Tr.Co.200), wherein it was held as follows:-

"Though strictly speaking, the plaintiff and the first defendant cannot be deemed to have formed a joint Hindu

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family still where a person acquires certain property with the help of funds which belonged to him jointly with the other and are available in his hand, the co-owners are entitled in equity to the proportionate interest in the newly acquired properties and a suit for partition cannot be resisted merely on the ground that the co-owners do not strictly form a joint Hindu family".

In 1978(I) MLJ 505, it was quoted as follows:

"32. In Halsbury's Laws of England, Third Edition, Vol.38, page 868, it has been observed that the principle that the property is deemed to be held on a resulting trust applies where several persons purchase property in the name of one; and where, however, two or more persons purchase property in their joint names or transfer property into their joint names, to contribute the purchase money or property in equal shares, they hold the property as joint tenants with benefit of survivorship both at law and in equity, unless there is evidence of a contrary intention on their part at the time of the purchase or transfer or there are circumstances from which such an intention can be inferred; and if they contributed the purchase money or property in unequal shares, whether the property is purchased in the name of one or in their joint names, there is a tenancy in common between them in equity, though even in this case the equitable tenancy in common may be rebutted by evidence or circumstances.

33. Snell has observed in his Principles of Equity (Twenty-seventh edition) at page 38:

"(c) Equal divison:

(1) the principle. In addition to equity's ancient dislike of a joint tenancy the maxim 'equality is equity' may be illustrated by a number of more modern instances. In general, the maxim will be applied whenever property is to be distributed between rival claimants and there is no other basis for division. "I think that the principle which applies here is Plato's definition of equality as a 'short of justice': If you cannot find any other, equality is the proper basis".

34. In the case now before us, it having been proved that the acquisitions of the A schedule properties were made by the joint efforts and with the income accrued from the joint efforts of these brothers, which had been mixed up with the personal income of the first defendant from the races, in the absence of evidence as to what exactly was the contribution made by the respective parties towards these acquisitions and in the absence of any agreement between the two brothers as to their respective interests in the joint

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acquisitions, the plaintiff will be certainly entitled to his half share in the A schedule properties".

20. Learned counsel for the plaintiff further submitted that true it is that by the plaintiff's letter Ex.B-2 dated 25.05.1996 to his father, out of desperation, he has mentioned that he will not ask for any share of his latter's property. That may be adverse to the interest of the plaintiff. Similarly, defendant also had abruptly denied the receiving of Rs.1.20 lakhs from plaintiff, which was found untrue as per the evidence mentioned above. Thus, it is able to be seen that both parties are exaggerating matters. But what we are concerned is only to chaff the evidence and find out the truth as was held in Thirumilai Iyengar .vs. Subba Raja (1962(1I MLJ 193) in the following lines:

"The duty of the Court is to give effect to the inference to be drawn from the evidence on record and it is not prevented from recording a finding which may not be consistent with the pleadings of either party in a suit".

Therefore, by chaffing the evidence ultimately it can be found that defendant had received a sum of Rs.1.20 lakhs from the plaintiff. Even though under plaintiff's first notice dated 17.08.1999 he has asked for the entire property or the entire refund of the amount, defendant has stated in Ex.A-6 dated 29.07.2002 as follows:

"I state that as falsely stated in your notice I never promised to buy a house for B.Ramachander Sah, I have bought for my own occupation and not for Ramachander alone..."

This "not for Ramachander alone" indicates that Ramachander, as claimed in the first notice dated 17.08.1999, is not entitled for the entire property; thus indicating that he will be entitled to a portion.

21. The word 'contribution' according to Oxford University is follows:

1. the act of contribjuting
2. something contributed,esp.money
3. an article etc.contributed to a publication.

(Middle English from Old French contribution or Late Latin contributio (as CONTRIBUTE)

22. The defendant also in one of his letters mentioned that such of the payment of plaintiff was only as a matter of help. Unless the defendant shows what was the other help, for which the amount was paid, then we can only say that the plaintiff had paid it only as a contribution to purchase a house. If the contribution is true, then under Section 45 of Transfer of Property Act, the plaintiff is entitled to such portion of the house in proportion to the money paid by him. Thus plaintiff claimed 3/4th share.

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23. Learned counsel for the defendant submitted that even after the purchase of suit property, which was by then a ground floor, the defendant had improved it by raising first floor and second floor and the plaintiff failed to prove the contribution made for the improvement. Although plaintiff had mentioned that he also contributed for the first and second floor of the suit property, absolutely there is no proof for the same. So, the plaintiff will be entitled to 3/4th share in the ground floor. In so far as that there is acquiescence against the construction of father in the first and second floor, the plaintiff may not make a claim.

For the aforesaid reasons, the judgment and decree of the trial court is modified and there will be a declaratory decree only for 3/4th share in the ground floor of the suit property and the defendant is entitled to first and second floor of the suit property constructed by him. Since the plaintiff is entitled for 3/4th share in the ground floor, it can be worked out by construing it as partible estate appointment of Commissioner by taking suitable steps therefor. Therefore, injunction is not granted. So far as the rental collections is concerned, he can take steps before the trial court under Order XX Rule 12 CPC. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

gl

To

1. The Registrar,
City Civil Court,
Madras.

2. The Additional District Judge,
Fast Track Court, V, Chennai.

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